

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

GLORIA SCOTT AND *
DEANIA JACKSON *
* NO. 96-8461
VERSUS * DIVISION "I"
* SECTION 14
THE AMERICAN TOBACCO *
COMPANY, INC., ET AL. *
*
* * * * *

Transcript of proceedings before The
Honorable Richard J. Ganucheau, Judge Pro Tempore,
Civil District Court, Parish of Orleans, State of
Louisiana, 421 Loyola Avenue, New Orleans, Louisiana
70112, commencing on June 18, 2001.

* * * * *
Tuesday
April 22, 2003
9:41 a.m.
* * * * *

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18625

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I N D E X

WITNESS: PAGE
W. KIP VISCUSI, Ph.D.
DIRECT EXAMINATION BY MR. MUEHLBERGER:..... 18629
CROSS-EXAMINATION BY MR. RUSS HERMAN:..... 18662

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P R O C E E D I N G S

(Jury seated.)

THE LAW CLERK:

All rise. Oyez, oyez, oyez, Civil
District Court for the Parish of Orleans is
now in session. The Honorable Richard
Ganucheau presiding. Silence is commanded.
Please be seated.

THE COURT:

Good morning.

Dr. Viscusi, you're still under oath.
You understand that?

THE WITNESS:

Yes, Your Honor.

THE COURT:

That lasts until I discharge you.

You ready?

MR. MUEHLBERGER:

Yes, Your Honor.

DIRECT EXAMINATION BY MR. MUEHLBERGER:

Q. Good morning, ladies and gentlemen of the
jury, I would like to reintroduce Dr. Kip Viscusi
from Harvard University.

A. Morning.

25 Q. I would like to summarize the opinions you
26 are going to give this morning to the jury before we
27 proceed in detail.
28 Have you prepared a chart to detail that?
29 A. I have.
30 MR. MUEHLBERGER:
31 Ted, could you pull up 3035, please?
32 MR. MUEHLBERGER:

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1 Move to publish, Your Honor.
2 THE COURT:
3 Objection?
4 MR. RUSS HERMAN:
5 No objection, Your Honor.
6 THE COURT:
7 You may publish it.
8 MR. MUEHLBERGER:
9 May we publish, Your Honor?
10 THE COURT:
11 You may publish, yes.

12 EXAMINATION BY MR. MUEHLBERGER:

13 Q. Professor Viscusi, could you briefly explain
14 to the jury what this chart demonstrates?

15 A. I have three key opinions. First, both
16 smokers and nonsmokers believe that smoking is more
17 dangerous than it really is. So, they overestimate
18 the risk rather than underestimate the risk.

19 Second, when presented with different risk
20 estimates, regardless of the source, people believe
21 the worst. So, if there's a risk debate out there,
22 people will believe the worst-case scenario.

23 Third, smokers respond to higher prices and
24 workplace restrictions by quitting or cutting back.
25 So, if the price of cigarettes goes up or if it's
26 hard to smoke because you're not allowed to at work,
27 people smoke less.

28 Q. Professor, are you here this morning to
29 downplay the risk of smoking?

30 A. No. I've always said that smoking is perhaps
31 the most risky activity or consumption activity that
32 any consumer can undertake.

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1 Q. Let's talk about your first opinion, that
2 people believe that smoking is even more dangerous
3 than it really is. What information did you
4 consider in reaching that opinion?

5 A. Well, to reach that opinion, you need two
6 pieces. First, you need to figure out how dangerous
7 is smoking and, second, you need to figure out what
8 are people's risk perceptions in relation to that
9 scientific evidence.

10 Q. How do people learn whether an activity is
11 risky?

12 A. There are lots of different sources of
13 information you have. Your parents, your church,
14 your school, the media, TV, doctors provide
15 information, public health classes. Your friends.
16 So, there are a variety of different information
17 sources that people could draw on.

18 Q. And do these information sources vary from
19 individual to individual?
20 A. They do because different people are exposed
21 to different things and rely on different sources of
22 information to make their judgments.
23 Q. Now, why is it important to know how people
24 perceive a particular risk?
25 A. Well, we would want to figure out whether
26 people are making knowledgeable decisions. Do they
27 know what they're getting into when they make risky
28 decisions.
29 Q. And what do we need to know to determine
30 whether more information is necessary for people to
31 determine whether a particular risk is risky or
32 not -- particular activity?

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1 A. We want to know if risk perceptions are
2 accurate or not. So, do people have sufficiently
3 high perception of the risk and, if not, then you
4 might want to provide more information, but if
5 people already know about the risk, then, you don't
6 need to provide more information.
7 Q. And have you applied these concepts to
8 perceptions of smoking and disease?
9 A. Yes, I have.
10 Q. And how did you do that?
11 A. Well, I looked at survey evidence on people's
12 risk beliefs and I compared the results of the
13 survey evidence to scientific evidence to the risks
14 of smoking.
15 Q. So, the first step is you figure out the
16 actual risk of smoking; is that right?
17 A. Yes. To figure out the scientific estimate
18 of the risk of smoking, I used estimates from the
19 Surgeon General and the National Cancer Institute
20 and I took those estimates at face value. I didn't
21 adjust them downward or anything. I just took them
22 exactly as the Surgeon General stated them.
23 Q. Okay. Why did you do that?
24 A. I did that because I wanted to establish a
25 scientific reference point for figuring out whether
26 people's risk beliefs were high enough, and I didn't
27 want to get involved in a medical debate as to
28 whether the Surgeon General was right, wrong or not.
29 Q. Okay. And according to the information
30 contained in the Surgeon General's Reports, what is
31 the actual risk of lung cancer?
32 A. The actual risk of dying from lung cancer

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1 from smoking is about six in 100 to 13 in 100. So,
2 out of 100 smokers, six to 13 of them will die from
3 lung cancer because they smoke.
4 Q. Is there also information in the Surgeon
5 General's Report that will tell us what the actual
6 risk of dying from any disease is?
7 A. Yes. Out of a hundred smokers, roughly 18 to
8 36 of them will die because they smoke.
9 Q. And do the Surgeon General's reports also
10 contain information estimated the estimate loss of

11 life expectancy from smoking?
12 A. Yes, you can use information from the Surgeon
13 General's reports to calculate that as well, and the
14 life expectancy loss the from smoking is from 3.6 to
15 7.2 years, somewhere in that range.
16 Q. Now that we know what the actual risks of
17 smoking are, what do we do next?
18 A. Next, we have survey questions that ask
19 people their risk beliefs in a way that you can
20 compare the risk belief answers to the numbers based
21 on the Surgeon General's reports to figure out if
22 risk beliefs are too high, too low or just right on
23 target.
24 Q. What kind of information do you need to do
25 that?
26 A. I use survey evidence. The surveys I
27 referred to before the Easter break where people
28 were asked out of 100 smokers how many of them would
29 get lung cancer because they smoke and similar kinds
30 of questions. So, they're objective questions.
31 Q. Did you measure people's perception of the
32 risks of smoking based upon properly designed and
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1 administered surveys?
2 A. Yes. In fact, I've analyzed the survey
3 questions. The format of the survey questions is
4 very similar to the kinds of things I've used for
5 the Environmental Protection Agency. I've analyzed
6 the data itself. I've run sensitivity tests using
7 different formulations of the questions. I also
8 subjected the surveys and my analysis of the surveys
9 to several rounds of peer review. They've been
10 published in peer-reviewed articles and books.
11 Q. Just to refresh the jury's recollection, are
12 these the four surveys that you talked about before
13 the holiday break?
14 A. Yes, they are.
15 Q. 1985, 1991, 1997 and 1998?
16 A. Yes, those are the four years.
17 Q. Based upon the fact that you've published
18 these results in peer-reviewed surveys, they've been
19 checked by other scholars, replicated elsewhere, do
20 you have any opinion as to the reliability of the
21 surveys?
22 A. Yes. Very reliable. In fact, scholars in
23 other universities have run similar surveys and
24 found stronger results that I've found.
25 Q. Are these the type of surveys reasonably
26 relied upon by scholars in your field of economics?
27 A. Yes, they are. I've published the results of
28 these surveys in many of the top economic journals.
29 Q. Have you prepared a chart to assist the jury
30 in understanding what you've learned from these
31 surveys about the people's perception of risk of
32 lung cancer?

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1 A. Yes, I have.
2 MR. MUEHLBERGER:
3 Ted, can you pull up 3058?

4 Move to publish.
5 MR. RUSS HERMAN:
6 No objection. I assume this is a
7 demonstrative?
8 MR. MUEHLBERGER:
9 Yes.
10 THE COURT:
11 You may publish.
12 EXAMINATION BY MR. MUEHLBERGER:
13 Q. Could you walk the jury through this chart
14 and what it demonstrates?
15 A. Let's take these one at a time. All of these
16 questions are of the general form, out of 100
17 smokers, how many do you think will get lung cancer
18 or die from lung cancer because they smoke. The
19 first bar for 1985, indicates that in the 1985
20 national survey, people thought 43 out of 100
21 smokers would get lung cancer because they smoke.
22 The second bar for 1991 is my North Carolina survey
23 that I did. And there, people thought that 38 out
24 of 100 smokers would die from lung cancer because
25 they smoke. The 1997 survey was a national survey
26 in which people thought that 47 out of 100 smokers
27 would get lung cancer because they smoke. The 1998
28 survey was a survey undertaken in Massachusetts and
29 the nature of the sample wasn't a random sample of
30 Massachusetts. We oversampled people on Medicaid.
31 Poorer people in Massachusetts were surveyed.
32 There, 48 out of 100 was the risk of death from lung
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1 cancer due to smoking in terms of the beliefs people
2 have.
3 Q. What does this last column over here show us?
4 A. Well, the last thing is the actual risk, 6 to
5 13 percent. Let's call it 10 percent, just the
6 midpoint. So, if the actual lung cancer fatality
7 risk from smoking is 10 percent and people think
8 it's anywhere from 38 percent to 48 percent, what
9 you have is a situation where people actually
10 overestimate the risk of lung cancer due to
11 cigarettes by a factor of four to five.
12 Q. Have you prepared another chart to show the
13 jury how smokers perceive their risk of dying of a
14 smoking-related disease?
15 A. Yes.
16 MR. MUEHLBERGER:
17 Ted, could you pull up 3045?
18 Move to publish, Your Honor.
19 MR. RUSS HERMAN:
20 No objection to this demonstrative.
21 THE COURT:
22 You may publish it.
23 EXAMINATION BY MR. MUEHLBERGER:
24 Q. Professor, could you walk the jurors through
25 this chart and what it demonstrates, please.
26 A. Yes. When I did this, I wanted to push my
27 analysis further. Instead of asking simply do
28 people believe that there's a lung cancer risk from
29 smoking, do they also understand the overall risk of
30 death from smoking. So, starting in 1991, I devised
31 a survey question asking people out of 100 smokers,

32 how many of them do you think will die from lung
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1 cancer, heart disease, throat cancer and other
2 ailments because they smoke. And you find that 54
3 percent is the risk that people assess, mortality
4 risk from smoking.

5 In 1997, this question was asked as part of
6 the national survey we've talked about, and there
7 people thought that the risk of death to smokers due
8 to smoking was 50 percent.

9 In 1998, Massachusetts survey, people thought
10 the risk of death was 54 percent.

11 The last bar over here is the actual risk
12 based on estimates from the Surgeon General, 18
13 percent to 36 percent. So, you can see that
14 people's estimates of what they think the risk is,
15 the total mortality risk, is roughly double what the
16 actual risk of death is from smoking.

17 Q. Professor, are these overperception of the
18 risk as demonstrated on these last two charts
19 surprising to someone like yourself who studies risk
20 perception for a living?

21 A. They're not surprising to me. The reason is
22 there's a large literature that shows that highly
23 publicized risks tend to be overperceived. We all
24 tend to overestimate the risk of being killed in an
25 earthquake or hurricane or tornado, and smoking is
26 perhaps the most highly publicized risk in the
27 United States. I've done actual literature searches
28 and turned up thousands of articles about smoking
29 risks.

30 Q. Have you prepared another chart to show how
31 many years of life smokers give up by smoking?

32 A. Yes, I have.

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1 MR. MUEHLBERGER:
2 Ted, could you pull up 3059, please?
3 Move to publish, Your Honor.
4 THE COURT:
5 Any objection?
6 MR. RUSS HERMAN:
7 No objection to this demonstrative, Your
8 Honor.
9 THE COURT:
10 You may publish.
11 MR. MUEHLBERGER:
12 Thank you, Your Honor.

13 EXAMINATION BY MR. MUEHLBERGER:
14 Q. Professor, could you walk the jury through
15 this chart, what it demonstrates, in your opinion,
16 please.

17 A. Well, I developed these questions as a
18 further test of smokers' risk beliefs. Sure,
19 smokers understand the overall mortality risk of
20 smoking, but do they understand how much life is
21 lost when they die. I ask questions asking them
22 what's the life expectancy loss that smokers are
23 going to experience. So, in 1991, men thought that
24 they lose 8.6 years of life expectancy because of

25 smoking, women, 13.2 years.
26 In 1997, the national survey, men thought
27 they'd lose 10.1 years of life expectancy, women,
28 14.8 years.
29 The 1998 Massachusetts survey, men at 10.1
30 years, women thought their life expectancy loss
31 would be 15.9 years.
32 Each of these answers, both for men and
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1 women, exceeds the actual estimate of the life
2 expectancy loss based on Surgeon General estimates
3 of 3.6 to 7.2 years.
4 Q. Once again, smokers overestimate the -- their
5 lost life due to smoking when compared to the
6 information contained in the Surgeon General's
7 Reports as to what decreased life expectancy they
8 might see; is that correct?
9 A. That's right.
10 Q. Now, have you also had a chance to study the
11 ways that people at different educational levels
12 perceive risk?
13 A. I have. In fact, I've written about that in
14 my publications.
15 Q. According to your research, does a person
16 need an college education to understand that smoking
17 is risky?
18 A. No. In fact, these answers to the risk
19 perception questions for people that haven't even
20 finished high school are just as high as those who
21 are college educated.
22 Q. Is it fair to say that based on the research,
23 work, your published literature that you've done
24 over the last 30 years that people perceive that
25 smoking is risky regardless of their education?
26 A. That's correct. Risk perception vary very
27 little with one's educational background. Everybody
28 thinks smoking is risky.
29 Q. Let's talk about age. Have you also had
30 occasion to study whether people of different ages
31 perceive different risk associated with smoking?
32 A. I have.

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1 Q. Could you tell the jury briefly -- have you
2 prepared a chart to help the jury with respect to
3 that literature?
4 A. I have, based on the 1985 survey, the
5 national survey we talked about.
6 MR. MUEHLBERGER:
7 Ted, could you pull up 3069, please?
8 Move to publish, Your Honor.
9 MR. RUSS HERMAN:
10 No objection to this demonstrative.
11 THE COURT:
12 You may publish it.
13 EXAMINATION BY MR. MUEHLBERGER:
14 Q. Professor, could you walk the jury through
15 this chart and explain what it demonstrates, in your
16 opinion?
17 A. Well, these responses indicate out of 100

18 smokers, how many of them do you think will get lung
19 cancer because they smoke. So, let's start with the
20 last two columns, the people who are age 22 to 25
21 think it's 42 out of 100. People who are age 46 and
22 over think it's 42 out of 100. People aged 16 to 21
23 think it's 49 out of 100. So, the youngest group of
24 respondents to the survey actually have higher risk
25 beliefs regarding the lung cancer risks of smoking
26 than do the older respondents to the survey.

27 Q. The young people thought smoking was even
28 more riskier than the older people, correct?

29 A. That's correct. Young people think it's
30 riskier than older people.

31 Q. Both young and old overestimate the risk of
32 smoking?

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1 A. That's right. All these risk estimates are
2 at least four times greater than the actual lung
3 cancer risk.

4 Q. We've been talking about surveys in the 1980s
5 and 1990s. Do you have an opinion whether people
6 overperceive the risk of smoking before that time
7 period?

8 A. Yes.

9 Q. What is your opinion?

10 A. Well, if you look at these surveys from 1985
11 through 1998, the results are fairly stable. People
12 will generally perceive the risk of smoking and the
13 perception answers don't change very much. If you
14 look at national public opinion polls on smoking
15 risk beliefs, they also were fairly stable even
16 before that time period. So, if you went back into
17 the '70s and, certainly, if you go back to the
18 period after the big report in 1964 and after the
19 wave of cigarette warnings, so, in all that era
20 after those big information disclosures, I would
21 expect to get similar kind of risk belief answers if
22 we had been able to go back in time.

23 Q. You mentioned polls. Have you looked at, for
24 instance, the Gallup Polls over the decades on this
25 issue?

26 A. I have. I've looked at every Gallup Poll
27 that's ever been run on smoking, I believe.

28 Q. Could you briefly tell the jury how Gallup
29 runs a poll, what a Gallup Poll is?

30 A. Gallup is a national public opinion polling
31 organization and, traditionally, I think they've
32 been the most respected opinion poll organization.

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1 In fact, back in the '50s and '60s, Dr. George
2 Gallup, who founded it, had a newspaper column where
3 he talked about his opinion poll results.

4 Q. Let's start by talking about whether people
5 connect lung cancer with smoking. Did you prepare a
6 chart to help the jury with that issue?

7 A. I did.

8 MR. MUEHLBERGER:

9 Ted, could you pull up 3068, please?

10 MR. RUSS HERMAN:

11 No objection to this demonstrative.
12 THE COURT:
13 You may publish it.
14 EXAMINATION BY MR. MUEHLBERGER:
15 Q. And could you walk the jury briefly through
16 this chart and what, in your opinion, it
17 demonstrates, Professor?
18 A. This chart focuses on risk awareness, have
19 people gotten the message that smoking is dangerous.
20 So, the first survey results here is January, 1954.
21 People were asked: Have you heard or read anything
22 recently that smoking may be a cause of cancer of
23 the lung? And we see that 83 percent of the people,
24 almost 50 years ago, had heard or read that smoking
25 may be a cause of cancer of the lung.
26 Q. That's this column right here?
27 A. That's the first column.
28 Later that year, June and July, the number
29 goes up even higher. When asked if they'd heard or
30 read anything recently that smoking may be a cause
31 of cancer of the lung, 90 percent of the people said
32 yes. And in 1957, July, 1957, did you happen to
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1 hear or read about the recent report of the American
2 Cancer Society reporting the results of a study on
3 the effects of cigarette smoking, 78 percent said
4 yes. Now, even though that number's less than the
5 other ones, Dr. George Gallup called the 78 percent
6 figure a phenomenal figure in polling annals, and
7 the reason is that people are being asked only about
8 one specific study, and 78 percent of the population
9 had heard about just one, you know, narrowly defined
10 study.
11 Q. How significant is it that in 1954 you've got
12 90 percent of the American public who have heard or
13 read that smoking may be a cause of cancer of the
14 lung?
15 A. Well, 90 percent's pretty close to a clean
16 sweep. It's very hard to get 100 percent answers to
17 any opinion poll.
18 Q. Have you prepared a chart to demonstrate
19 that?
20 A. Yes, I have.

21 MR. MUEHLBERGER:
22 Ted, call up 3073, please.
23 Move to publish, Your Honor.
24 THE COURT:
25 No objection?
26 MR. RUSS HERMAN:
27 No objection to this demonstrative, Your
28 Honor.
29 THE COURT:
30 You may publish.
31 MR. MUEHLBERGER:
32 Thank you, Your Honor.

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1 EXAMINATION BY MR. MUEHLBERGER:
2 Q. Professor, could you walk the jury through
3 this chart and explain what it demonstrates, in your

4 opinion.
5 A. Well, the red bar is from the previous chart
6 that we did. 90 percent of the public had heard or
7 read that cigarette smoking may cause lung cancer.
8 That was the one for the middle of 1954.
9 The same year, they asked people, you know,
10 can you identify the first book of the Bible, which
11 is Genesis. 49 percent of the people could. So,
12 over half of the people couldn't identify the first
13 book of the Bible.
14 We have a couple results here from 1996. Can
15 you identify the vice president of the United
16 States? And only 70 percent of the people could
17 name Al Gore as the vice president of the United
18 States.
19 Similar to same year, can you identify the
20 host of The Tonight Show, and only 64 percent of the
21 people could identify Jay Leno as being the host of
22 The Tonight Show.
23 Q. Professor, in your experience conducting
24 surveys, is it common that 100 percent of people
25 would agree with any question?
26 A. It's very difficult to get 100 percent
27 agreement on anything.
28 Q. Why is that?
29 A. Well, in part, people may misunderstand the
30 question, not paying attention to the survey
31 question. So, there's random error in survey
32 responses.

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1 Q. Now, did you also review public opinion polls
2 about people's belief in the idea that smoking is a
3 cause of lung cancer?
4 A. Yes, I have.
5 Q. Could you tell the jury briefly what your
6 research showed on that subject?
7 A. Smokers have a high risk belief that smoking
8 causes lung cancer, not only to other people, but
9 also to themselves.
10 Q. Based on -- were these polls over various
11 decades prior to 1980?
12 A. They were. I've looked at evidence, I
13 recall, from 1970, you know, to 1999 or '69 to '99,
14 and, generally, you've got, you know, somewhere from
15 70 to 90 percent of the people over that time period
16 believing that smoking is a cause of lung cancer.
17 It's not a question of simply being aware of the
18 link between smoking and lung cancer. The
19 substantial risk belief that smoking causes lung
20 cancer. I think those numbers are very high because
21 to say that something causes lung cancer may mean
22 that people think, well, maybe it has to always
23 cause it in smokers. So, it's a very strong result.
24 Q. Do these national surveys we've been talking
25 about tell us anything about the people in Louisiana
26 and what they've known about dangers of smoking?
27 A. Well, they tell us about all of America and
28 there's no reason to assume that Louisiana has been
29 left out of the loop in terms of the information
30 that's been disseminated about smoking. In fact,
31 there's surveys in Louisiana that suggest that there

32 is widespread awareness.
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1 Q. In your opinion, are people in the United
2 States and Louisiana aware of the risk of lung
3 cancer from smoking cigarettes?
4 A. Yes, they are. In fact, the Bogalusa study
5 in Louisiana indicates that third to sixth graders,
6 close to 100 percent, not 100 percent, believe that
7 smoking causes lung cancer.
8 Q. You've told us about Gallup Polls. Let's
9 talk about statements made by the public health
10 authorities and community over the decades regarding
11 the link between smoking and lung cancer and what
12 the public knew about that. During the 1950s and
13 1960s, who was responsible for telling the public
14 about health issues?
15 A. Public health officials. We have a variety
16 of health officials. You have the Surgeon General,
17 who is still around back then. You have the
18 National Institute on -- National Cancer -- I think
19 there was a National Cancer Institute. There's also
20 a Smoking and Health office in the Department of
21 Health, Education and Welfare. So, various public
22 health officials to the U.S. government.
23 Q. And during the 1950s and 1960s, what were
24 these public health community officials saying about
25 the link between lung cancer and smoking?
26 A. They were all essentially saying the same
27 thing. The message that smoking is dangerous was
28 getting out there, that they'd gotten it out there
29 through the media, and the public was adequately
30 informed.
31 Q. You mentioned the Surgeon General. Have you
32 reviewed the Surgeon General's statements about that
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1 issue in the 1950s, for instance?
2 A. I have. I've reviewed Surgeon General Leroy
3 Burney, Surgeon General Stuart. These were two
4 Surgeon Generals who spoke about the public
5 information campaign against smoking during that
6 rough time period.
7 Q. Did you prepare a demonstrative about Surgeon
8 General Burney's review on this subject?
9 A. Yes, I did.
10 MR. MUEHLBERGER:
11 Ted, call up 3066, please.
12 MR. RUSS HERMAN:
13 No objection.
14 MR. MUEHLBERGER:
15 Move to publish.
16 THE COURT:
17 You may publish.
18 EXAMINATION BY MR. MUEHLBERGER:
19 Q. What does this demonstrative tell us about
20 that subject?
21 A. Surgeon General Burney had the following
22 statement. I'll quote him:
23 "Our position is that we have informed
24 the public through the excellent coverage of

25 the press, radio and TV. We believe that is
26 as far as we should go at this time until and
27 when we have additional information."
28 Q. Who was Dr. John Heller?
29 A. Dr. John Heller, I believe, was the head of
30 the National Cancer Institute.
31 Q. Did you prepare a chart to demonstrate what
32 his views were on this subject?

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1 A. Yes.
2 MR. MUEHLBERGER:
3 Ted, call up 3063, please.
4 MR. RUSS HERMAN:
5 No objection.
6 MR. MUEHLBERGER:
7 Move to publish, Your Honor.
8 THE COURT:
9 You may publish it.
10 EXAMINATION BY MR. MUEHLBERGER:
11 Q. What did Dr. Heller say in 1952 about this
12 subject, Professor?
13 A. Dr. Heller had the following statement.
14 Q. 1957.
15 A. Memoranda newspapers, radio, TV and other
16 media have done an excellent job covering this
17 problem and a very objective job. This is an
18 exceedingly valuable way of informing the public.
19 Q. Finally, do you know who Dr. Horn was during
20 this period of time?
21 A. I do. The two cancer researchers who put the
22 smoking/cancer linkage on the map were Drs. Hammond
23 and Heller. They were a research team. Dr. Horn
24 was one half of the team, and he was made head of an
25 office called, I believe, the Office of Smoking and
26 Health. A name to that effect.
27 Q. Did you prepare a chart to help illustrate
28 what he had to say about this for the jury's
29 benefit?

30 A. Yes, I did.
31 MR. MUEHLBERGER:
32 Call up 3065, Your Honor, please.
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1 May we publish?
2 MR. RUSS HERMAN:
3 Again, no objection.
4 THE COURT:
5 You may publish.
6 EXAMINATION BY MR. MUEHLBERGER:
7 Q. What did Dr. Horn have to say about the
8 public's knowledge of the risk of smoking?
9 A. Dr. Horn, head of the national clearinghouse
10 for smoking and health said:
11 "You could stand on a rooftop and shout
12 that smoking is dangerous at the top of your
13 lungs and you would not be telling anyone
14 anything they did not already know."
15 And he said this in 1968.
16 Q. Are statements like these typical of what
17 other medical authorities were saying about the

18 state of public awareness regarding cigarettes?
19 A. Yes. In fact, around this same time period,
20 Surgeon General Stewart, at a world conference on
21 smoking, made a similar statement that the message
22 was getting out there and the public was adequately
23 informed.
24 Q. Does that include Louisiana as well?
25 A. Yes. Nobody said that Louisiana was left out
26 of the loop.
27 Q. Let me turn to another topic briefly.
28 MR. MUEHLBERGER:
29 You can take that down, Ted.
30 EXAMINATION BY MR. MUEHLBERGER:
31 Q. Can you explain the concept of ambiguous
32 risks to the jury, please?
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1 A. Some risk, you just don't know for sure. So,
2 if I'm flipping a coin, we know for sure that it's a
3 50 percent chance it's a head or 50 percent chance
4 it's a tail. That's not ambiguous risk. If I ask
5 Mr. Muehlberger what's the chance it's going to rain
6 tomorrow, he may say 20 percent chance. That's an
7 ambiguous risk, because he really doesn't know that
8 probability for sure.
9 Q. You could say that again. Have you studied
10 how people perceive a risk when there's mixed
11 information on a topic?
12 A. Yes, I have.
13 Q. For whom have you done this work?
14 A. I did this for the Environmental Protection
15 Agency, and what they wanted to know is when there's
16 a risk debate, when some scientists say the risk is
17 high and other scientists say the risk is low, what
18 do people make of the risk debate. So, how do they
19 make sense out of the risk debate that's taking
20 place.
21 Q. Have you prepared a chart to make this plain
22 to the jury?
23 A. I have.

24 MR. MUEHLBERGER:
25 Ted, could we call up 3052, please?
26 Move to publish, Your Honor.
27 MR. RUSS HERMAN:
28 No objection to this demonstrative.
29 THE COURT:
30 You may publish.

31 EXAMINATION BY MR. MUEHLBERGER:
32 Q. Professor, could you briefly explain to the
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1 jury what this chart demonstrates?
2 A. Well, we've got two pictures here. We've got
3 the one on the left, St. Louis Cathedral and Jackson
4 Square where, let's say, one scientist says the air
5 is clean. Then, we have the picture on the right
6 where somebody says, no, the air is polluted, it's
7 dirty. So, there's a risk debate out there. One
8 scientist says the risk is high. The other
9 scientist says the risk is low. When that happens,
10 when you have different parties doing this, when you

11 have the government saying the risk is high and, in
12 our study, we had the polluting industry, the
13 industry causing the pollution saying the risk is
14 low, who do people believe, and people believe the
15 government. They don't pay attention to the
16 industry estimate. It's the government estimate.
17 People gravitate toward the worst-case scenario.
18 Q. So, it doesn't matter if this information
19 comes from different sources?
20 A. It doesn't matter whether it's the government
21 that says the risk is high and the industry says
22 it's low or the industry says the risk is high and
23 the government says it's low, so long as there's a
24 risk debate involving two different parties, people
25 will tend to gravitate toward the high-risk
26 estimate.
27 Q. So, people tend to believe the bad news or at
28 least put that in a risk assessment analysis, right?
29 A. Right. They don't simply average. They go
30 above average toward the high-risk assessment.
31 Q. Have you prepared any articles as to how
32 people respond to risk ambiguity?

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1 A. I have.
2 Q. Tell us what you've done in that respect?
3 A. Published more than one article, but one of
4 them is an international economics journal called
5 The Economic Journal, and that article was awarded
6 the best-article-of-the-year award by the Royal
7 Economics Society, which is an international
8 economics society based in England.
9 Q. Have your conclusions in that article been
10 disputed by other scholars?
11 A. No. In fact, people have found similar
12 results.
13 Q. Okay. So, Professor, can we apply what
14 you've just told us to the Scott class here, in
15 Louisiana?
16 A. Yes. If you have a situation where there's a
17 smoking risk debate, where one party said the risk
18 is high and the other party said the risk is low,
19 people will gravitate toward the high-risk estimate.
20 And if you have the case that I think is probably
21 more closely resembles this where one party says the
22 risk is high and the other party says all the
23 evidence is not yet in, people still tend to
24 gravitate toward the worst-case scenario, the
25 high-risk estimate.
26 Q. How about if one party says smoking can be
27 highly addictive and the other says, no, it's just
28 an habituation. Would the principle you just
29 described apply to that concept?
30 A. Yes. People gravitate toward the high-risk.
31 Q. So, they accept the worst-case scenario?
32 A. Yes, when there's different parties, like the

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1 government and industry.
2 Q. Let me move to another topic briefly.
3 There's been testimony in this case about a theory

4 called optimistic bias. Are you familiar with that
5 theory?

6 A. Yes. In fact, I've studied this for the
7 Environmental Protection Agency as well.

8 Q. Have you done research on that?

9 A. Yes. I've published on this back in the
10 1980s and have written about it recently as well.

11 Q. Could you give the jury a sense as to what
12 research you've published on this document?

13 A. The first thing I did was back in the 1980s
14 regarding whether people had optimism bias with
15 respect to household chemical risks. What I found
16 is that if you ask people are you riskier than the
17 average person or safer than the average, no one
18 wants to admit that they're worse than average. So
19 that if you ask the question that way, you can find
20 optimism bias, or so-called optimism bias
21 everywhere. But we then had other questions for
22 these same people who said, yeah, I'm safer than
23 average. Are you willing to pay more money for
24 safer consumer products, and even though they said
25 they were safer than average, they were willing to
26 pay very, very large amounts for safer consumer
27 products.

28 So, responding to these are-you-better-or-
29 worse-than-average questions in that way doesn't
30 necessarily mean that people are not safety
31 conscious. It's just that basically an artifact or
32 a consequence of how you ask the question.

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1 In fact, when I asked my students how many of
2 them -- do you think you should get an above-average
3 grade in this class, and they'd write it down and
4 then submit it to me, almost every student thinks
5 that they're above average. No one wants to say
6 that they're below average.

7 Q. Have you found in your research that everyone
8 thinks about risks in the same way?

9 A. No. It differs. For example, women have
10 different risk perceptions than do men, take one
11 example --

12 Q. Can you give the jury an example of research
13 you've done on these individual differences?

14 A. I've done detailed analysis of how a variety
15 of demographic characteristics, age, gender and
16 other factors, affect risk beliefs and risk-taking
17 behavior, and there are substantial differences
18 across the population.

19 Q. For whom have you done this research?

20 A. This has all been done for the U.S.
21 Environmental Protection Agency.

22 Q. Has your work on this topic been published in
23 peer-reviewed literature?

24 A. Yes. It has been published in peer-reviewed
25 articles and books.

26 Q. Now, if optimistic bias exists, is it going
27 to be the same for every individual?

28 A. No. Some people will have different
29 perceptions of the risk and they'll differ from
30 other people.

31 Q. Okay. If someone does have optimistic bias

32 about one risk, does that mean they'll have
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1 optimistic bias about another kind of risk?
2 A. No. So, for example, you may think you're
3 going to win the lottery. You may be optimistic
4 about that. That doesn't mean you can cross the
5 road across from the courthouse without looking for
6 cars and not getting run over.
7 Q. Okay. As we found out this morning. People
8 could be optimistic about some risks then and not
9 about others; is that right?
10 A. That's right.
11 Q. Now, Professor, how can we find out whether
12 people are optimistic about smoking?
13 A. Well, one way is to ask them.
14 Q. Have you done that?
15 A. I've looked at evidence from the Gallup
16 Polls, and the Gallup Polls indicate that roughly
17 two-thirds of all smokers believe that smoking has
18 already affected their health. More recent Gallup
19 Poll evidence indicate that's most smokers believe
20 that smoking will eventually affect their health
21 adversely.
22 Q. Have you prepared a chart to demonstrate that
23 to help the jury understand this concept?
24 A. Yes, for the second set of results.

25 MR. MUEHLBERGER:
26 Ted, could you pull up 3062, please?
27 Move to publish, Your Honor.
28 THE COURT:
29 Any objection?
30 MR. RUSS HERMAN:
31 I just need one minute, Your Honor.
32 No problem. We have no objection.

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1 THE COURT:
2 You may publish.
3 MR. MUEHLBERGER:
4 Thank you, Your Honor.
5 EXAMINATION BY MR. MUEHLBERGER:
6 Q. Professor, could you walk the jury through
7 this and what it shows?
8 A. Well, the question is how likely do you think
9 it is that you will have serious health problems
10 from smoking if you continue to smoke? What we find
11 is that 78 percent of smokers think it's likely or
12 very likely that they'll have serious health
13 problems from smoking if they continue to smoke.
14 Q. And how does that demonstrate this optimistic
15 bias theory or not?
16 A. People know that smoking is risky to them,
17 so, there is a risk to themselves. There's no
18 evidence of this optimism bias hypothesis here.
19 Q. Okay. Now, Dr. Arnett, when he was here,
20 talked about instances where people said they're
21 going to quit, but they didn't quit smoking. Have
22 you looked at that issue?
23 A. I have.
24 Q. And what have you found on that subject?

25 A. What people say on that issue is not what
26 they always mean. So, there's one study I examined
27 in which hundreds of parents were offered the
28 opportunity to participate in a smoking-cessation
29 clinic. And they're asked, well, if the clinic was
30 available, would you use it, and close to half of
31 them said sure. You know, I'd like to quit smoking,
32 I'll take advantage of the clinic. But the clinic
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1 was actually made available to them and it turns out
2 that very, very few of them, something like 3
3 percent, actually attended the clinic when it was
4 available. So, even though they say they want to
5 quit smoking, when it comes to actually following
6 through, even though they were offered the smoking-
7 cessation clinic, hardly any of them did.

8 Q. Professor, in your opinion, is there any
9 credible evidence that adults exhibit optimistic
10 bias towards smoking?

11 A. No. There's no evidence of that.

12 Q. Professor, in your opinion, is there any
13 credible evidence that young people exhibit
14 optimistic bias towards smoking?

15 A. No. In fact, you find the opposite.

16 Q. Now, even with all this information out there
17 and the beliefs you've just told us about smoking,
18 if a smoker, an individual smoker still believes
19 he's going to be the lucky one and not get a
20 smoking-related disease, in your opinion, is there
21 anything any one person or a company can do to
22 convince that person that he's not going -- not
23 going to be the lucky one that's not going to get
24 the smoking-related disease?

25 A. No. If people are consistently irrational
26 once they've gotten the information, then, there's
27 nothing you can do to fix this.

28 Q. Let me turn to another topic, Professor.
29 There's been testimony in this case discussing the
30 concept of nicotine addiction. Is addiction
31 something an economist can study?

32 A. Yes. There's an economic literature on the
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1 economics of addiction. We don't pretend to be
2 medical experts. We approach addiction from an
3 economics standpoint.

4 Q. You are not here to talk about medical
5 diagnosis of addiction, right?

6 A. That's correct.

7 Q. Have economists published studies relating to
8 addiction?

9 A. Yes, they have. In fact, chapters out of two
10 of my books deal with cigarette addiction from an
11 economic standpoint.

12 Q. And what do those studies show?

13 A. The popular notion of what cigarette
14 addiction is is that people are locked into smoking
15 and they can't change. So, is that really true?
16 What we find is that people are, first of all, very
17 responsive to changes in the price of cigarettes.

18 So, as the price of cigarettes goes up, people buy
19 fewer cigarettes. In fact, people are roughly as
20 responsive to increases in the price of cigarettes
21 as they are to increases in the price of other
22 things that they buy at the store.

23 The second set of results has to do with
24 smoking restrictions. As smoking restrictions are
25 imposed on a workplace or a hospital, people don't
26 have a target number of cigarettes that they have to
27 smoke that day. So, they're not locked into smoking
28 their 20 or 30 cigarettes a day. They actually cut
29 back the amount of cigarettes they smoke. So that
30 people respond to both money prices of cigarettes as
31 well as smoking restrictions, and they cut back when
32 the cost of cigarette smoking goes up.

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1 Q. Okay. So, you're saying that if the price of
2 cigarettes goes up, that smokers respond to that
3 price increase like they do for other consumer
4 goods?

5 A. Yes. In fact, there are dozens of studies
6 that document this. So, for example, a 10 percent
7 increase in the price of cigarettes will lead people
8 to cut back anywhere from 4 to 10 percent in terms
9 of the amount of cigarettes they smoke.

10 Q. If smokers had no choice as to whether to
11 smoke, would you expect this reaction to increased
12 prices of cigarettes to smokers decreasing their
13 smoking?

14 A. No. If smokers were locked in to smoking a
15 particular number of cigarettes, you know, boosting
16 the price a little bit wouldn't affect their smoking
17 behavior. We feel that people are actually quite
18 price responsive.

19 Q. Now, do other scholars agree with you on
20 this?

21 A. Yes. Dozens of scholars agree with me on
22 this, including Dr. Cummings, who's testified here,
23 as well as various antismoking advocates who've
24 advocated higher cigarette taxes as a way to cut
25 back on smoking, and the mechanism there is higher
26 prices reduce smoking.

27 Q. As an economist, do you consider consumers'
28 reaction to increased cigarette prices to be a
29 rational reaction?

30 A. Yes. This is the way people should respond.
31 If the price of something goes up, you buy less of
32 it. This is exactly the same kind of behavior we

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1 observed with smokers. When the price of cigarettes
2 go up, they buy fewer cigarettes.

3 Q. You also said when smoking restrictions go
4 into place, for instance, at one's workplace, the
5 literature and studies you've looked at also
6 indicate that people respond to those restrictions;
7 is that right?

8 A. That's right. Many of those studies indicate
9 that people cut back their smoking 10 to 15 percent
10 when smoking restrictions go into place.

11 Q. Now, Professor, are you here to tell the jury
12 that for every smoker out there, it's easy to quit
13 smoking?
14 A. No. For some people, it's very, very
15 difficult.
16 Q. Have you reviewed the literature on smoking
17 addiction? Do you consider smoking cigarettes so
18 addictive that smokers are incapable of making a
19 rational choice to quit?
20 MR. RUSS HERMAN:
21 Objection, Your Honor. Calls for a
22 medical opinion.
23 MR. MUEHLBERGER:
24 Not from an economic --
25 MR. RUSS HERMAN:
26 Wait a minute, Counselor. I only made
27 one objection.
28 MR. GAY:
29 Objection, Your Honor.
30 THE COURT:
31 The objection is overruled.
32 Doctor, but you're not authorized to
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1 give a medical opinion. If you can answer it
2 within the realm of your expertise, you may
3 answer it.
4 THE WITNESS:
5 Thank you, Your Honor.
6 A. From an economic standpoint, people have
7 every sense of balancing benefits and costs in terms
8 of their decision. So, I've shown in my analysis as
9 people's risk beliefs regarding smoking go up, they
10 are less likely to smoke. As prices of cigarettes
11 go up, they cut back on their cigarettes. As
12 smoking restrictions are imposed, they cut back on
13 their smoking. So, all of this is consistent with
14 the rational balancing of the benefits and costs,
15 doing their own personal risk utility tests with
16 regard to smoking.
17 MR. MUEHLBERGER:
18 Thank you very much, Professor. That's
19 all I have.
20 MR. RUSS HERMAN:
21 I have a few questions for you,
22 Professor.
23 THE COURT:
24 We're going to take our mid-morning
25 recess at this point. We will begin with the
26 cross-examination of the witness after that
27 recess. We'll recess until quarter to 11:00
28 by the wall clock.
29 (Jury excused.)
30 THE COURT:
31 Let the record reflect the jury has left
32 the courtroom.

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1 Anything for the record by Plaintiff
2 Counsel?
3 MR. RUSS HERMAN:

4 No, Your Honor.
5 THE COURT:
6 Defense Counsel, anything for the
7 record?
8 MR. WITTMANN:
9 No, Your Honor.
10 THE COURT:
11 All right. We'll recess.
12 (Whereupon, a brief recess is taken.)
13 (Jury seated.)
14 THE LAW CLERK:
15 All rise. Recess is over. Court will
16 come to order.
17 THE COURT:
18 Please be seated.
19 Cross-examination by plaintiff's
20 counsel?
21 MR. RUSS HERMAN:
22 Yes, Your Honor.
23 THE COURT:
24 You may proceed, Mr. Herman.
25 MR. RUSS HERMAN:
26 Morning, Your Honor. Morning, ladies
27 and gentlemen of the jury. And morning,
28 Professor.
29 THE WITNESS:
30 Morning, Mr. Herman.
31 CROSS-EXAMINATION BY MR. RUSS HERMAN:
32 Q. Do you realize you are the only witness to
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1 testify in this trial so far that didn't offer one
2 document in evidence?
3 A. No, I've not read other testimony.
4 Q. I notice that you put some demonstrations up,
5 but the material supporting your testimony was never
6 offered in evidence, was it?
7 A. I don't understand -- is that a legal
8 question?
9 Q. No, sir. I mean, that's a plain, simple
10 question, sir.
11 A. My books were never offered in evidence or --
12 Q. Well, you put a bunch of demonstratives up,
13 but you never offered the surveys, did you? You
14 never put them in evidence, did you?
15 A. Whatever -- I don't know what my lawyer did.
16 So --
17 Q. Ah. Ah. We'll get to what -- I'll ask you
18 about those questions later. Let's just put up one
19 of the things you offered and take a look at it and
20 maybe you can explain some things. Gallup Polls.
21 Let's put up, for example, DDA-3072.
22 MR. RUSS HERMAN:
23 Can we display that? It was displayed
24 by the defendants. It's their exhibit.
25 MR. MUEHLBERGER:
26 We did not use this demonstrative.
27 MR. RUSS HERMAN:
28 Oh, you didn't use that one. What about
29 DDA-3059? 3059. I believe you used that
30 one.
31 May I publish, Your Honor?

1 Yes.

2 EXAMINATION BY MR. RUSS HERMAN:

3 Q. Did you have any help preparing this by your
4 lawyers?

5 A. I gave them the numbers and their people
6 turned it into a bar chart.

7 Q. The lawyers' people turned this exhibit for
8 this jury into a bar chart, correct?

9 A. The graphics people did the colorful things.
10 I've already done bar charts myself in my book, but
11 they turned it into a color overhead.

12 Q. Sir, that's not my question. You gave this
13 to the lawyers and they produced this chart; isn't
14 that true? Isn't that true?

15 A. I gave them all the information and they
16 turned it into a chart, yes.

17 Q. Great. Now, do you see the question: "What
18 Do People Believe About Lost Life Expectancy"?

19 A. Yes.

20 Q. Isn't that misleading, sir?

21 A. Not to me. I explained to the jury what all
22 these questions meant.

23 Q. Well, isn't there a survey specifically in
24 Louisiana that came out very recently that shows
25 that children 11 to 15 in Louisiana, in grades five,
26 six, seven and eight, are cigarette smokers, double
27 the amount across this country? Isn't that true?

28 A. I haven't seen the study, but it has nothing
29 to do with beliefs about life expectancy as you've
30 described them, Mr. Herman.

31 Q. Well, why doesn't your chart say what do
32 children believe about lost life expectancy?

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1 A. Children were not in these samples.

2 Q. Oh, you didn't sample children. But I
3 thought when we were here last, you agreed with me
4 that the average age that someone begins to smoke is
5 around 14 years old. Didn't you agree with that
6 last time we were here?

7 A. I didn't -- if you're talking about smoking
8 on a continuous basis, I never agreed. You cited
9 some statistics and I had no reason to disagree
10 since I had no independent statistics on that issue.

11 Q. And you actually didn't put the underlying
12 evidence that supports this chart in evidence.
13 Wouldn't it be better to say, and more honest to
14 say: "What do people over the age of 18 believe
15 about lost life expectancy"? Wouldn't that have
16 been a more honest thing to say, sir, on that chart?

17 A. There is nothing dishonest about this. I've
18 always characterized my charts accurately.

19 Q. Yes. It could be a whole cup. This looks
20 like a whole cup, or it could be a half a cup. One
21 can hold water, one can't; isn't that true?

22 A. That doesn't look like it'll hold much water,
23 Mr. Herman.

24 Q. Let's talk about optimism. Are there people

25 that say that this cup of water is half full and
26 other people that say that it's half empty? Just
27 use some common sense. Isn't that true? Don't you
28 know that?
29 A. This cup's going to leak all the water, Mr.
30 Herman. It's got a hole in it.
31 Q. No. This cup, like that chart, is going to
32 leak a big thing.

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1 A. Right.
2 Q. This cup has got water in it. Don't you
3 agree some people will look at this cup and say,
4 it's either half full or half empty?
5 A. Both are symmetric, yes.
6 Q. Yes, sir. Some of optimistic and some of
7 pessimistic. That's what our common sense tells us;
8 isn't that true?
9 A. Saying a glass is half full or half empty has
10 nothing to do with optimism bias, hypothesis with
11 respect to risk.
12 Q. I'm a common sense fellow. University of
13 Virginia, a good university?
14 A. Yes, it is.
15 Q. Tough requirements to get in, and their
16 graduates are well respected, aren't they?
17 A. I'm not sure all of them are well respected.
18 Q. Well, generally speaking --
19 A. I can't name that many Virginia graduates.
20 Q. Well, I can name one. Aaron Brooks. Do you
21 know who Aaron Brooks is, sir?
22 A. No.
23 Q. He's the Saints quarterback. He said he
24 never expected, a headline, ever to get injured
25 playing pro football. Now, there's a man, educated,
26 University of Virginia, a graduate, highly skilled,
27 never in his own mind believed that he would get
28 hurt. You don't call that optimistic bias?
29 A. The way the quotation I read, "I did not
30 expect to be injured" could be interpreted he did
31 not think there was a greater than a 50 percent
32 chance that he would be injured.

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1 Q. Sir, is that optimistic for a pro quarterback
2 who's getting pounded?
3 A. He's never been injured yet. He's played in
4 lots of games in his life without injury. So, he
5 doesn't expect to be injured.
6 Q. I guess, sir, you don't know he was injured
7 and played injured the last four games of the season
8 and had to undergo surgery. You don't know that, do
9 you?
10 A. I do know he was injured, yes.
11 Q. Let me put up another one of these charts.
12 It doesn't make any difference to me which one. It
13 was one you used. I thought it was DDA-3058. Let's
14 put up your demonstrative that your lawyers made,
15 3058.

16 MR. RUSS HERMAN:
17 May I publish, Your Honor?

18 THE COURT:
19 You may publish.
20 EXAMINATION BY MR. RUSS HERMAN:
21 Q. "What Do People Believe About the Risk of
22 Lung Cancer?" Not what children believe, what
23 people believe, correct?
24 A. That's what it says.
25 Q. Okay. 1985, that was a survey paid for and
26 bought and paid for by R.J. Reynolds and others, is
27 it not? Isn't that the 1985 survey you talked about
28 when you were here last?
29 A. It was paid for by law firms representing the
30 tobacco industry, and I'm not sure which --
31 Q. Jones, Day, correct?
32 A. It was one of three firms, yes.
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1 Q. And Shook, Hardy also paid for some of these
2 surveys based -- that this chart's based on,
3 correct?
4 A. Shook, Hardy was part of the '85 one as well,
5 yes.
6 Q. Well, look at 1985. Now, the evidence isn't
7 before the jury, just this chart, and that's the
8 only one of these four in which people under 18 were
9 surveyed and they began at age 16; is that correct?
10 A. That's correct.
11 Q. How many 16-year-olds? Can you tell from the
12 survey?
13 A. No, because you just have the age range
14 response.
15 Q. Yeah. You don't know whether there were
16 three 16-year-olds or 1,000 because you don't have
17 the underlying data to show how many 16-year-olds or
18 17-year-olds were surveyed; isn't that correct?
19 A. I have the data on the number of people 16 to
20 21. So, I can tell you it's not 1,000.
21 Q. Sir --

22 MR. GAY:
23 Objection. Objection.

24 EXAMINATION BY MR. RUSS HERMAN:
25 Q. Answer my question, please.

26 THE COURT:
27 Approach the bench, gentlemen.
28 (Whereupon, a sidebar conference is
29 held as follows:)

30 THE COURT:
31 Your objection, Mr. Gay.

32 MR. GAY:
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1 The witness is in the middle of his
2 answer and Mr. Herman is interrupting.
3 That's the objection.

4 THE COURT:
5 I think that is probably correct. Let
6 him finish his answer, Russ, and you've been
7 asking what I consider to be bordering on
8 compound questions. Single questions and let
9 him finish his answer.

10 MR. RUSS HERMAN:

11 Sure.
12 (End of sidebar.)
13 THE COURT:
14 Doctor, have you finished your answer
15 from the previous question?
16 THE WITNESS:
17 No. I had not, Your Honor. I was cut
18 off.
19 THE COURT:
20 You may complete the answer that you had
21 started.
22 EXAMINATION BY MR. RUSS HERMAN:
23 Q. First of all, I want to apologize for cutting
24 you off. It was rude of me, and I'll try not to let
25 it happen again. Lawyers shouldn't do that. I'm
26 sorry. Go ahead and give the answer.
27 A. I do know the number of 16- to 21-one-year-
28 olds, and the nature of the survey procedure was
29 that they randomized the respondent based on who in
30 the household had the most recent birthday. So, you
31 would expect an equal distribution of 16-year-olds,
32 17-year-olds, et cetera, throughout the age range.
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1 So, it would not be three.
2 EXAMINATION BY MR. RUSS HERMAN:
3 Q. Sir, how many 16-year-olds were surveyed in
4 1985?
5 A. I can't give you an exact count.
6 Q. Thank you.
7 In 1991, you did that survey, correct.
8 A. I did.
9 Q. How many 11, 12, 13, 14, 15, 16 and
10 17-year-olds were surveyed?
11 A. None, because I made the age cutoff 18.
12 Q. So, you didn't survey, again, you did not
13 survey a youth in the 1991 survey you did, correct?
14 A. That's correct.
15 Q. And, as a matter of fact, you destroyed or
16 threw out the underlying documentation for that
17 survey; isn't that true?
18 A. Well, I published the results of the survey,
19 and when I moved to Harvard, I did not save all of
20 the coding sheets where we wrote down all the
21 answers because I was cleaning up my office and I
22 can't bring everything with me. But I still have
23 representative coding sheets and I have published
24 the results of the survey in the same way that
25 Gallup publishes their results. So, just the way
26 they've published results, I've peer-reviewed
27 published results of the survey.
28 Q. Is that a "Yes" or a "No"?
29 A. I don't have the coding sheets.
30 Q. You threw them out?
31 A. When I cleaned up my office, I did. I moved.
32 Nobody requested them after several years. I tossed
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1 them.
2 Q. You were working for the tobacco industry and
3 the fact that they didn't request them, you knew

4 that they were prepared, these surveys were prepared
5 in the anticipation of lawsuits and for purposes of
6 lawsuits, didn't you?
7 A. My survey had nothing whatsoever to do with
8 either the industry or preparation for a lawsuit.
9 It was prepared without the industry's knowledge
10 and, at the time, I was not being retained on any
11 tobacco matters. That happened after I moved to
12 Harvard.
13 Q. Sir, haven't you testified before that your
14 1991 survey was so that you could validate the 1985
15 survey prepared for litigation?
16 A. Yes, but I did that on my own, and my
17 validation had nothing to do with work for the
18 tobacco industry. It was undertaken without their
19 knowledge and without their financial support.
20 Q. And you threw out the underlying data when
21 you moved to Harvard?
22 A. After several years after publishing the
23 results, nobody asked for it. I didn't keep it.
24 Q. 1997, was that survey prepared and financed
25 by the tobacco/cigarette industry?
26 A. It was paid for by law firms representing the
27 industry.
28 Q. Law firms that are representing one or
29 more -- one or more law firms that are representing
30 tobacco in this case?
31 MR. GAY:
32 Objection, Your Honor.

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1 THE COURT:
2 Approach the bench.
3 (Whereupon, a sidebar conference is held
4 as follows:)
5 THE COURT:
6 I make the observation that we were
7 talking about one lawyer per witness per
8 side, and Muehlberger did the direct and
9 you're doing the objecting on cross. Does
10 anybody think that violates our ground rules?
11 MR. GAY:
12 I don't think it does, Your Honor.
13 THE COURT:
14 So, you're going to be the only defense
15 counsel objecting?
16 MR. GAY:
17 No. I think I'm just objecting for
18 Philip Morris. I'm objecting to the -- on
19 the grounds of what we talked about last
20 week, going in and trying to finger-point the
21 words in this courtroom.
22 MR. RUSS HERMAN:
23 I'm testing the evidence. I'm sure
24 they've got a right to know who paid for
25 surveys.
26 THE COURT:
27 The objection is overruled.
28 (End of sidebar.)
29 THE COURT:
30 The objection is overruled.
31 Answer the question, please, Doctor.

32 A. I know Arnold & Porter was one of the law
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1 firms that paid for it. I don't know if Arnold &
2 Porter is in this room.
3 EXAMINATION BY MR. RUSS HERMAN:
4 Q. Well, I have a copy of the survey. Would you
5 like to see it?
6 A. That would help.
7 MR. RUSS HERMAN:
8 I need the other box of their documents,
9 please.
10 We're going to come back to the question
11 because I don't want to delay this, and then
12 I'll show you the '97 survey.
13 EXAMINATION BY MR. RUSS HERMAN:
14 Q. '98, is that a survey prepared by the --
15 paid for, rather, by the tobacco industry, the
16 cigarette industry?
17 A. It was paid for by law firms representing
18 them, yes.
19 Q. For litigation purposes, yes?
20 A. For the Massachusetts A. G. case, yes.
21 Q. That was a lawsuit, was it not?
22 A. That's right.
23 Q. Okay. So, all three of the surveys that this
24 chart's based on, the '85, the '97 and '98, were
25 paid by law firms for litigation or lawsuit
26 purposes, correct?
27 A. Those three surveys were, yes.
28 Q. And '91, '97, '98 don't have any questions
29 directed at youth; isn't that correct?
30 A. No one under the age of 18 was in the sample.
31 Q. All right. Let me ask you a question: You
32 didn't, in any of these surveys, say what do you
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1 believe will happen to you if you continue smoking;
2 isn't that correct?
3 A. That survey question wasn't there because I
4 believed that the question as I've worded it is a
5 better way to ask the question.
6 Q. You don't know what people felt their risk
7 was individually because you never asked the
8 question; isn't that correct?
9 A. No. The format of the question, when you ask
10 people what's the risk out of 100 smokers, is the
11 general approach I use in my studies for EPA. You
12 ask the people what's the risk to a reference
13 population, and you can show this is actually
14 pertinent to what they think the risks. I've run
15 tests with these data showing the higher their
16 responses to that question, the less likely they are
17 to smoke. So, it does affect whether they smoke or
18 not.
19 Q. There were only four to six questions in the
20 '97, '98 survey; isn't that correct?
21 A. No.
22 Q. How many questions were there?
23 A. '97, '98 had detailed questions on
24 demographic characteristics, like computer usage and

25 so on.
26 Q. Sir, there were only four to six questions
27 about cigarette smoking in the 1997 survey; isn't
28 that correct?
29 A. Well, that's a different question than you
30 just asked.
31 Q. Yes, sir. I'm sorry, and I stand corrected.
32 A. Yes. There were only, basically, a handful
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1 of questions about cigarette smoking.
2 Q. And they were done over the telephone; isn't
3 that correct?
4 A. Yes, these were telephone interviews.
5 Q. You didn't have any individuals from a
6 community sit down and answer 25 pages of questions
7 about their background and what they knew about
8 cigarette smoking, did you?
9 A. No. This is a telephone survey.
10 Q. You didn't have them examined by a court of
11 law or lawyers as to the answers, did you?
12 A. That's not the way surveys are done. They
13 are run by survey people, not by courts and lawyers.
14 Q. I see. So, you asked four to six questions
15 over the telephone, and none of them were directed
16 to youth, correct?
17 A. In the '91 through '98 surveys, you had to be
18 age 18. 1985, you had to be age 16.
19 Q. Let me get back, because I certainly don't
20 want to leave a question unanswered that I said I
21 would ask. I'd like you to look at the cigarette
22 companies' exhibits SA-2534, dated --

23 MR. RUSS HERMAN:

24 Would you put that back up, please --

25 EXAMINATION BY MR. RUSS HERMAN:

26 Q. Dated 1985. Read off the names of the law
27 firms that are on that exhibit.
28 A. Arnold & Porter, Jones, Day, Reavis and
29 Pogue, and Shook, Hardy and Bacon.
30 Q. I'm going to show you -- Jones, Day and
31 Shook, Hardy, you know, are in this case, correct?
32 A. I believe both of them are. I know Shook,
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1 Hardy is.
2 Q. When I asked you about 1997, what the law
3 firms were, you weren't sure. So, I'm going to hand
4 you the '97 survey. Is the Jones, Day law firm
5 listed on the face of that survey?
6 A. Right. There's two this time instead of
7 three. Arnold & Porter and Jones, Day.
8 Q. And Jones, Day is also representing cigarette
9 companies in this case, correct?
10 A. Yes.

11 MR. RUSS HERMAN:

12 Now, let's take that chart down.

13 EXAMINATION BY MR. RUSS HERMAN:

14 Q. Let's talk about, evidently, what no one from
15 these cigarette companies who have brought you here
16 told you about.

17 MR. WITTMANN:

18 Objection, Your Honor. May we approach?
19 THE COURT:
20 You may approach
21 (Whereupon, a sidebar conference is held
22 as follows:)
23 MR. WITTMANN:
24 Your Honor, Mr. Herman has a way of
25 making a speech before asking a question. I
26 would ask that he not make those speeches;
27 simply ask a question.
28 MR. RUSS HERMAN:
29 I'm making a transition, the same way
30 Mr. Muehlenberg and you have done as to what
31 the next subject's going to be.
32 THE COURT:

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1 I understand, but you did make a factual
2 statement, and that's inappropriate as a
3 transitional tool.
4 The objection's sustained.
5 Next question, please.
6 (End of sidebar.)

7 EXAMINATION BY MR. RUSS HERMAN:
8 Q. Did Philip Morris and their attorneys in this
9 case provide you with the following survey before
10 you came here to testify, the Roper survey of
11 August, 1953, which surveys children age 13 to 18?
12 A. I don't recall seeing it, but if you showed
13 it to me, I might be able to see if I've seen it or
14 not.
15 Q. Well, the reason -- sir, did you not testify
16 when you were here before Easter that you had not
17 looked at any of the exhibits in this case?
18 A. I had not made a special mission of looking
19 at exhibits in this case. I've seen lots of things
20 dealing with tobacco. I don't know what's been an
21 exhibit and what hasn't.
22 Q. Sir, didn't you make the statement when you
23 were last here that you had not reviewed the
24 exhibits in this case?
25 A. I stand by my answer. I've not made a
26 special project of looking at exhibits, but I've
27 read lots of things about tobacco over the past
28 years, and some could have been exhibits in the
29 case.
30 Q. In the last eight or nine days, have you
31 undertaken a review of the exhibits which have been
32 offered in evidence to this jury?

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1 A. No, not a detailed review.
2 Q. Well, sir, what is a detailed review as
3 contrasted with a review?
4 A. I may have seen some documents that happened
5 to have been exhibits. I don't know if the things
6 that I've seen in my work on this case are exhibits
7 or not exhibits.
8 Q. Let's just talk about the last eight days.
9 Did you review any surveys that Philip Morris or one
10 of these lawyers handed you that was done in 1953 on

11 13-year-olds?
12 A. I've looked at a 1953 Roper survey.
13 Q. In the last eight days?
14 A. Yes. I may have seen it before as well.
15 Q. Was that survey 13-, 14-, 15- and 16-
16 year-olds?
17 A. I don't recall the exact age group, but it
18 did include people under the age of 18.
19 Q. All right. Now, did Philip Morris or any of
20 its lawyers since you were here last give you the
21 Roper survey done in 1974 that surveyed individuals
22 age 14 or less?
23 A. I don't recall that one.
24 Q. Did Philip Morris or any of its lawyers
25 provide you with a document, Exhibit 3523, dated
26 March 29, 1979, that Marlboro dominates the 17 and
27 under market.
28 MR. WITTMANN:
29 Objection, Your Honor. May we approach?
30 THE COURT:
31 Yes.
32 (Whereupon, a sidebar conference is held
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1 as follows:)
2 MR. WITTMANN:
3 Mr. Herman is referring to documents not
4 in evidence, characterizing what they say.
5 MR. RUSS HERMAN:
6 They're all in evidence. I've got the
7 dates they were in evidence.
8 MR. WITTMANN:
9 They may be, but his characterization of
10 what a document says or doesn't say, I think,
11 is improper examination.
12 MR. RUSS HERMAN:
13 All I'm doing is asking him if he's seen
14 it.
15 THE COURT:
16 You've tendered the documents in
17 evidence?
18 MR. RUSS HERMAN:
19 Yes, they're all there.
20 MR. WITTMANN:
21 As far as his characterization as to
22 what the document is, I think, is improper.
23 If he has a question about a document, the
24 witness ought to be able to see the document
25 instead of having to accept Mr. Herman's
26 statement as to what it is.
27 THE COURT:
28 I think that's coming. I think that
29 would be a better way to approach it.
30 Overruled.
31 MR. MUEHLBERGER:
32 I don't think this document he is
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1 referring to is on the cross exhibit list. I
2 couldn't find it.
3 MR. RUSS HERMAN:

4 It's Exhibit 3523.
5 (End of sidebar.)
6 EXAMINATION BY MR. RUSS HERMAN:
7 Q. With reference to Exhibit Number 34 -- I'm
8 sorry -- 0451.02 by R.J. Reynolds, dated September
9 30th, 1974, admitted in evidence in this case on
10 February 27th, 2003, a survey of individuals 14 to
11 24 years old called young adults. Were you provided
12 with that survey?
13 A. I don't recall seeing that survey.
14 Q. Exhibit 3430, admitted in evidence on
15 February 16th of '03, Philip Morris document dated
16 5/21/75, a survey of 15- to 19-year-olds, were you
17 given that document?
18 A. I don't know what's in that document, but I
19 have not received that as part of this case.
20 Q. What about Exhibit 2891.01, admitted in
21 evidence on February 13th, 2003, dated October, '81,
22 a Lorillard survey regarding Newport and smoking
23 habits of 10- to 13-year-olds and 14- to
24 17-year-olds. Were you given that document?
25 A. I don't think I've seen that one either.
26 Q. Now, there have been a number of letters that
27 cigarette companies sent to fourth-, fifth- and
28 sixth-grade classes.
29 MR. MUEHLBERGER:
30 Objection.
31 EXAMINATION BY MR. RUSS HERMAN:
32 Q. Have you seen those letters, sir?
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1 MR. MUEHLBERGER:
2 Objection. May we approach?
3 THE COURT:
4 You may approach.
5 (Whereupon, a sidebar conference is held
6 as follows:)
7 THE COURT:
8 Mr. Muehlberger?
9 MR. MUEHLBERGER:
10 Mr. Herman said cigarette companies sent
11 letters to third-, fourth-, fifth-, sixth-
12 graders. Lorillard never sent such
13 communications, and I object.
14 THE COURT:
15 As I recall, the letters were sent to
16 the schools or the teachers, not to the
17 children, Mr. Herman. I think you need to be
18 very specific and very precise.
19 MR. RUSS HERMAN:
20 Okay. I will do that.
21 THE COURT:
22 Does your recollection agree with mine?
23 MR. RUSS HERMAN:
24 No, sir. Actually, the responses were
25 we are responding to your second-grade class
26 or fourth-grade class that made an inquiry,
27 and this is our response. Please advise your
28 kids.
29 THE COURT:
30 I think, technically, they were
31 addressed to the teacher or to the school.

MR. RUSS HERMAN:
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1 All right. I will withdraw and restate
2 it.

3 MR. WITTMANN:

4 The other thing is Mr. Herman continues
5 to characterize the document in a way he
6 wants to characterize it, which is not what
7 the document is. He keeps referring to
8 surveys of 14-year-olds. There's no
9 marketing survey that we used that didn't
10 survey 14-year-olds.

11 THE COURT:

12 Isn't that what redirect is going to be
13 for?

14 MR. WITTMANN:

15 I suppose. I continue to object to his
16 characterization -- mischaracterization.

17 THE COURT:

18 Noted and overruled.

19 Don't mischaracterize exhibits, Mr.
20 Herman.

21 (End of sidebar.)

22 EXAMINATION BY MR. RUSS HERMAN:

23 Q. Sir, have you seen the document written to
24 the second-grade teacher on June 6th, 1972, in which
25 the cigarette companies indicate that there is --
26 well, have you seen the letter?

27 A. No.

28 Q. Have you seen the letter admitted in evidence
29 on February 7th, 2003, dated 5/1/1963 to a fourth-
30 grade class teacher in Tacoma about cigarette
31 smoking and the health issue?

32 A. No.

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1 Q. Have you seen the document 02373.01 written
2 to a fifth-grade teacher in Santa Monica,
3 California, on 4/7/72 regarding the cigarette
4 companies' position on health and smoking?

5 A. No.

6 Q. Have you seen the August -- excuse me -- the
7 January 11th, 1980, letter written to a fifth-grade
8 class teacher in am Hurst, New York, which was
9 admitted in evidence as Exhibit 4858, February 27th,
10 '03?

11 A. No.

12 Q. So, I take it you have not seen any of the
13 direct evidence before this jury as to what position
14 the cigarette companies took --

15 MR. GAY:

16 Objection.

17 THE COURT:

18 Let's have the question asked and then
19 I'll entertain your objection, please, so
20 I'll be able to rule on the entire question.

21 Ask the question, please, Mr. Herman.

22 MR. RUSS HERMAN:

23 Sure.

24 EXAMINATION BY MR. RUSS HERMAN:

25 Q. You have not been presented the evidence as
26 to the position the cigarette companies took from
27 1963 to 1980 in writing grammar school teachers
28 about the evidence as to smoking and health; is that
29 correct?

30 MR. GAY:

31 Objection, Your Honor.

32 MR. MUEHLBERGER:

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1 Objection.

2 THE COURT:

3 Approach the bench, please.

4 (Whereupon, a sidebar conference is held
5 as follows:)

6 THE COURT:

7 Either one of you can be first.

8 MR. GAY:

9 Mr. Herman is mischaracterizing this
10 evidence. It is -- Philip Morris never wrote
11 any of these letters, and he's using this to
12 say the companies did this, and it's
13 improper.

14 THE COURT:

15 Let me check the question.

16 Are any of those letters written by or
17 on behalf of Philip Morris?

18 MR. RUSS HERMAN:

19 One is written on behalf of all the
20 companies by someone who was with the Tobacco
21 Institute. This was written by R.J.
22 Reynolds.

23 MR. MUEHLBERGER:

24 This is what he just asked about, not
25 written by Lorillard.

26 MR. GAY:

27 And I object to the --

28 MR. WILLIAMS:

29 I object to the question on behalf of
30 Brown & Williamson on the same grounds Mr.
31 Gay articulated.

32 THE COURT:

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1 I think the question needs to be
2 specific as to these defendants, Mr. Herman.
3 So, I'll sustain the objection to the
4 question.

5 MR. RUSS HERMAN:

6 Okay.

7 THE COURT:

8 Just a moment.

9 MR. GAY:

10 He keeps doing it, Judge. The proper
11 method is if you want the witness to deal
12 with the document, you have to deal with the
13 document. You just can't make up things
14 about the document in your answer and ask the
15 witness if he's seen it.

16 THE COURT:

17 I've instructed Mr. Herman to be very

18 specific with his question. I've heard the
19 objection to the question. Instruct the
20 witness not to answer it, the jury to
21 disregard the question.
22 You may ask another question.
23 MR. RUSS HERMAN:
24 Thank you, Your Honor.
25 (End of sidebar.)
26 THE COURT:
27 The objection is sustained.
28 Don't answer the question.
29 The jury will disregard the question.
30 Next question, Mr. Herman.
31 EXAMINATION BY MR. RUSS HERMAN:
32 Q. I'm going to show you Exhibit 4858, admitted
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1 in evidence on 2/27/2003, dated January 11th, 1990.
2 MR. RUSS HERMAN:
3 Your Honor, I'd like it put on the
4 screen for yourself and Counsel. It's been
5 already admitted in evidence, Your Honor.
6 It's an R. J. Reynolds document from 1990.
7 May we publish?
8 THE COURT:
9 No objection, you may publish.
10 MR. RUSS HERMAN:
11 Carl, would you put up the first page?
12 Thank you.
13 Would you please highlight where it says
14 R.J. Reynolds and the date? Can you enlarge
15 that for us? Would you go back to the first
16 page and highlight where it says "Principal."
17 Would you enlarge that? Okay. Now, would
18 you please go to the first paragraph, where
19 it says what grade of student this letter is
20 written to. All right. Now, would you go
21 to -- if you'll excuse me, Dr. Viscusi.
22 Would you please, Carl, go to the last
23 paragraph on that page and blow it up as
24 large as you can?
25 MR. GAY:
26 Objection.
27 THE COURT:
28 Approach the bench.
29 (Whereupon, a sidebar conference is held
30 as follows:)
31 THE COURT:
32 Mr. Gay?
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1 MR. GAY:
2 Your Honor, Mr. Herman has yet to show
3 that this witness knows anything about this
4 document. So, he puts up a paragraph that
5 has to do with names of the company on toys.
6 The very next paragraph explains the
7 company's position. He ignores that and goes
8 to some other paragraph. This is improper
9 use of an exhibit with a witness who knows
10 nothing about it for some apparent

11 exploitation of the subject matter. I have
12 to strenuously object to this type of
13 procedure.
14 THE COURT:
15 Why do you say it's improper? He's
16 qualified as an expert in surveys and we have
17 wide-open cross. What's the objection?
18 MR. GAY:
19 It has nothing to do with surveys,
20 Judge. Nothing.
21 MR. MUEHLBERGER:
22 And there's been no showing under 602
23 that this witness has any personal knowledge.
24 He's already established that.
25 MR. RUSS HERMAN:
26 He's an expert, not a fact witness. It
27 applies to fact witnesses, Number 1. Number
28 2, you put up --
29 THE COURT:
30 Mr. Williams, anything for the record?
31 MR. WILLIAMS:
32 No, Your Honor.

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1 THE COURT:
2 Objection is overruled.
3 (End of sidebar.)
4 THE COURT:
5 The objection is overruled.
6 You may highlight the portion of the
7 letter that was requested to be highlighted.
8 EXAMINATION BY MR. RUSS HERMAN:
9 Q. Dr. Viscusi --
10 THE COURT:
11 Make sure your microphone is on, Mr.
12 Herman.
13 MR. RUSS HERMAN:
14 Thank you, Judge. It's on, but the
15 power is off. I hit the wrong button again.
16 I'm sorry. Thank you.
17 EXAMINATION BY MR. RUSS HERMAN:
18 Q. Were you shown this letter about what the --
19 what this tobacco company, R.J. Reynolds, in 1990,
20 was advising a fifth-grade class of with regard to
21 cigarette smoking and health?
22 A. I haven't seen the letter that was sent to
23 the principal.
24 Q. Now -- may I have that back, please? Thank
25 you.

26 Sir, I'm going to direct your attention
27 to Exhibit 0255, admitted in evidence on February
28 7th, 2003, to this jury, dated May 1st, 1963, and
29 ask you if you have seen this letter written to
30 fourth graders at the Geiger School.
31 A. The answer to your question is no, I haven't
32 seen the letter.

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1 MR. RUSS HERMAN:
2 Your Honor, I'd like it put on the
3 screen, and may I publish?

4 MR. GAY:
5 Objection.
6 THE COURT:
7 Overruled.
8 You may publish.
9 MR. RUSS HERMAN:
10 Now, Carl, would you put the date,
11 please, and the addressee? And it's
12 written -- the jury can see the date, to whom
13 it's written.
14 Carl, would you go to the highlighted
15 portion I premarked now. The fourth
16 paragraph, the sentence that begins
17 "Despite."
18 Would you take the first sentence, Carl,
19 and blow that up?
20 EXAMINATION BY MR. RUSS HERMAN:
21 Q. Sir, so, now my question is: You were not
22 aware before you took the stand that from 1963 to
23 1990, grade-school children were being advised that
24 science could not establish smoking as a causal link
25 with human disease; is that correct?
26 MR. WITTMANN:
27 Objection, Your Honor. May we approach?
28 (Whereupon, a sidebar conference is held
29 off the record.)
30 THE COURT:
31 Mr. Wittmann?
32 MR. WITTMANN:

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1 Mr. Herman's got --
2 MR. RUSS HERMAN:
3 Excuse me, Phil. I've got to turn this
4 off. Go ahead.
5 MR. WITTMANN:
6 Mr. Herman has two letters from which he
7 wants to make this sweeping generalization
8 that from 1963 to 1990 students were being
9 advised such and such and such and such.
10 There's no basis for that question. It's an
11 objectionable question. He has two letters
12 and all he's got is two letters, and the
13 witness knows nothing of any other letters.
14 He didn't know anything of these two.
15 THE COURT:
16 Anything else for the record?
17 THE COURT:
18 The objection is overruled.
19 (End of sidebar.)
20 THE COURT:
21 The objection is overruled.
22 You can answer the question. You
23 remember the question? You want me to read
24 it back?
25 THE WITNESS:
26 Yeah, please.
27 THE COURT:
28 Sir, so, now, my question is: "You were
29 not aware before you took the stand that from
30 1963 to 1990 grade-school children were being
31 advised that science could not establish

32 smoking as a causal link with human disease;
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1 is that correct?"
2 A. That's correct.
3 EXAMINATION BY MR. RUSS HERMAN:
4 Q. I want to go to another one of your surveys.
5 Let's go to any slide that you put up for this jury
6 of Gallup Polls. Well, the ones that I have labeled
7 were 3072.
8 MR. RUSS HERMAN:
9 Put up 3072, please.
10 MR. MUEHLBERGER:
11 This is not one we used, Russ.
12 MR. RUSS HERMAN:
13 Which one did you use, Counselor?
14 MR. GAY:
15 3058.
16 MR. RUSS HERMAN:
17 Put up 3058.
18 MR. RUSS HERMAN:
19 That's not the one I'm talking about.
20 You had -- you used a Gallup Poll.
21 MR. MUEHLBERGER:
22 Try 3068.
23 MR. RUSS HERMAN:
24 Yeah, 3068. You put up 3068? Okay.
25 May we publish, Your Honor?
26 THE COURT:
27 Yes.
28 EXAMINATION BY MR. RUSS HERMAN:
29 Q. Sir, with reference to the Gallup Poll in
30 1954, didn't Gallup come out and criticize R.J.
31 Reynolds for using that poll and misinterpreting it?
32 MR. MUEHLBERGER:
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1 Objection, Your Honor. May we approach?
2 THE COURT:
3 Yes.
4 (Whereupon, a sidebar conference is held
5 as follows:)
6 THE COURT:
7 Mr. Muehlberger?
8 MR. MUEHLBERGER:
9 Your Honor, the objection is hearsay.
10 This has come up before with Dr. Cummings.
11 Mr. Herman is asking one criticism by one
12 person involved at one point in time about
13 somebody else's use of this. It's pure
14 hearsay. If someone from Gallup were here to
15 talk about this, fine. He's asking now for
16 pure hearsay as to what he's heard about what
17 Gallup said.
18 MR. RUSS HERMAN:
19 I can ask him if --
20 THE COURT:
21 Mr. Gay wants to say something, Mr.
22 Herman.
23 MR. GAY:
24 In addition, Your Honor, there's an

25 apparent statement out of a statement by
26 Gallup that was made in connection with some
27 other case in which the poll was being used,
28 and it has no relevance to this case.
29 MR. MUEHLBERGER:
30 I have the transcript of the prior use.
31 THE COURT:
32 The objections are overruled. That's
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1 what redirect is for. I'm going to instruct
2 him to answer the question.
3 (End of sidebar.)
4 THE COURT:
5 The objection is overruled. You may
6 answer the question. Do you remember the
7 question or shall I read it back?
8 THE WITNESS:
9 I remember this one, Your Honor.
10 THE COURT:
11 You may answer the question.
12 A. Dr. Gallup has never criticized the use of
13 these polls, to the best of my knowledge. I believe
14 that a staffer at Gallup, in an unpublished
15 internal -- or memo may have criticized one expert's
16 use of the polls, but to the best of my knowledge,
17 nobody has ever criticized my use of the Gallup
18 Polls in my publications or anywhere else.
19 EXAMINATION BY MR. RUSS HERMAN:
20 Q. Sir, listen to my question: Is it not a fact
21 that the Gallup organization criticized R.J.
22 Reynolds' use of a 1954 poll?
23 A. I believe a staffer, Lydia Saad, not Dr.
24 Gallup, who is deceased, did a critique of some
25 historian's use of the polls, but not my use of the
26 polls.
27 Q. Sir, I will show you Exhibit 0235.01, the --
28 "The Gallup Organization, The Tobacco Industry
29 Summons Polls to the Witness Stand" by Lydia Saad,
30 the Gallup organization, and Steve O'Brien. The
31 Gallup organization, May 15th, 1998.
32 MR. MUEHLBERGER:

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1 Objection, Your Honor. May we approach?
2 (Whereupon, a sidebar conference is held
3 as follows:)
4 THE COURT:
5 Mr. Muehlberger, your objection?
6 MR. MUEHLBERGER:
7 Hearsay, Your Honor. Apparently, it's a
8 text of something that was utilized, a
9 speech, somewhere in St. Louis. It was never
10 peer-reviewed or published in any peer-
11 reviewed journal.
12 MR. RUSS HERMAN:
13 I haven't asked a question yet.
14 THE COURT:
15 There is no question. If you want to
16 read what Mr. Herman said, I have it on my
17 laptop. It's not a question. He's showing

18 him this. There's no question about it and
19 there's no offer.
20 MR. MUEHLBERGER:
21 All right.
22 THE COURT:
23 The next utterance may be objectionable,
24 but that one is overruled.
25 (End of sidebar.)
26 THE COURT:
27 The objection is overruled.
28 Mr. Herman, ask the witness a question,
29 please.

30 EXAMINATION BY MR. RUSS HERMAN:

31 Q. Have you seen this criticism before?

32 A. I have.

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1 Q. You have?

2 A. I have.

3 Q. You have not?

4 A. I have.

5 Q. Oh, you have seen it before and you've
6 reviewed it before, have you not?

7 A. I've never read the whole thing, but I knew
8 that it existed and I browsed through it, or some
9 similar type of thing.

10 Q. Were you familiar with the newspaper article
11 published in the Wall Street Journal about Gallup's
12 criticism of R.J. Reynolds' use of this poll in
13 litigation?

14 MR. MUEHLBERGER:

15 Objection. Objection, Your Honor. May
16 we approach?

17 THE COURT:

18 You may approach.

19 (Whereupon, a sidebar conference is held
20 as follows:)

21 THE COURT:

22 Mr. Muehlberger?

23 MR. MUEHLBERGER:

24 Your Honor, I think it was inadvertent.

25 This document was not in evidence. Mr.
26 Herman showed it up in front of the jury. It
27 is not in evidence. I object to him
28 displaying something and publishing it. It's
29 not in evidence.

30 MR. RUSS HERMAN:

31 I didn't do that.

32 THE COURT:

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1 Don't do it. Don't hold it up to the
2 jury.

3 Objection is overruled.

4 (End of sidebar.)

5 EXAMINATION BY MR. RUSS HERMAN:

6 Q. Did you read the Wall Street Journal
7 criticizing the use of the Gallup Poll in
8 litigation?

9 A. No. I knew an article existed, but I don't
10 think I read that.

11 Q. That's the first time you've seen it?
12 A. I believe so, yes.
13 Q. Well, since you don't know about it and
14 didn't know about it, I won't ask you about it.
15 The Gallup polls, I noted that the ones
16 you used didn't poll 18 and unders, did it.
17 A. Eighteen and over, I believe, was the cutoff.
18 Q. Right. Still no polling of -- by --
19 supporting your surveys of 14-, 11-, 12-, 13-,
20 15-year-olds, correct?
21 A. No. That's right.
22 Q. Let's go on to another issue. I want to talk
23 to you about -- well, isn't it a fact that beginning
24 in 1985, you were created by the tobacco industry as
25 a witness to combat the notion that cigarettes were
26 addictive?
27 A. No, there's no truth to that whatsoever. In
28 fact, I didn't start doing any work, even advising
29 them on the hazard warning literature, until around
30 '86 or '87. And I don't think they've ever talked
31 to me about addiction. Addiction's something I came
32 into independently as part of my two books.

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1 Q. Now, you had indicated that you had begun
2 work for the cigarette companies in the 1980s, and
3 in 1985, you went to Cleveland and Jones, Day law
4 firm let you look through some drawers; isn't that
5 correct?
6 A. No, that was somewhere between '86 and '88.
7 It was not in '85.
8 Q. I'm in error. You found a 1985 survey,
9 correct?
10 A. That's correct.
11 Q. And none of the lawyers for big tobacco, none
12 of the cigarette company execs have ever talked to
13 you about addiction.

14 MR. GAY:

15 Objection.

16 MR. MUEHLBERGER:

17 Objection.

18 EXAMINATION BY MR. RUSS HERMAN:

19 Q. Is that your testimony?

20 THE COURT:

21 Answer -- approach the bench, please.

22 (Whereupon, a sidebar conference is held
23 as follows:)

24 THE COURT:

25 First of all, I think it's a compound
26 question, but I'll hear the objections.

27 MR. GAY:

28 It's just a continuous parade of
29 inflammatory remarks from Mr. Herman.

30 "Lawyers for big tobacco" and just parading
31 all these inflammatory remarks is
32 prejudicial. It appeals to passion. It's

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1 inappropriate.

2 MR. RUSS HERMAN:

3 There have been documents in this trial

4 that refer to these cigarette companies as
5 "big tobacco." That's Number 1. Number 2,
6 he said that no one ever talked to him from
7 these companies about addiction. There's
8 nothing inflammatory about this. It's
9 factual.

10 MR. GAY:
11 The jury can hear everything you're
12 saying.

13 THE COURT:
14 Lower your voice. It's at least a
15 compound question. I'll instruct the witness
16 not to answer it for that reason. Try again.

17 MR. RUSS HERMAN:
18 Sure.
19 (End of sidebar.)

20 THE COURT:
21 That is a compound question and the
22 objection is sustained.
23 Don't answer that question.
24 Next question, please.

25 EXAMINATION BY MR. RUSS HERMAN:
26 Q. I apologize again. Sometimes my foot falls
27 out of my mouth and words just run out. So, I'll
28 break it down.

29 Sir, are you telling us in this
30 courtroom that in the 14 to 20 years you have been
31 doing work for the cigarette companies, no cigarette
32 company executive has ever discussed addiction with
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1 you, nicotine addiction.

2 A. I don't think I've -- meet cigarette company
3 executives very often. The only time I recall
4 dealing with cigarette company officials is when I
5 consulted on the design for the Premier cigarette
6 warning label. Otherwise, it's lawyers representing
7 the industry.

8 Q. Sir, my question is: You have never
9 discussed nicotine addiction with any company
10 employee of a cigarette company; is that correct?

11 A. I believe that's true.

12 Q. And you've never discussed nicotine addiction
13 with any of the lawyers representing the cigarette
14 companies; is that correct?

15 A. No. In fact, as you know, I've -- this is
16 not the first case in which I've been deposed or
17 testified on the addiction issue.

18 Q. Sir, I'm not talking about some economic
19 theory of addiction. I'm talking about nicotine
20 addiction. Haven't you discussed with the cigarette
21 company lawyers nicotine addiction?

22 A. Did I ever ask the lawyers, is nicotine
23 addictive from a medical standpoint? Is that what
24 you're asking?

25 Q. I'll try to do it again. Sir, are you
26 telling us that you have never discussed with the
27 cigarette company lawyers in the 14 to 20 years
28 you've been working with the cigarette companies
29 that idea that nicotine addicts people, are you
30 saying that?

31 A. That certainly has come up because I've

32 written about nicotine addiction.
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18700

1 Q. And has it come up that Shook, Hardy has
2 indicated to the cigarette companies that it has a
3 position in litigation about cigarette addiction?
4 Have you ever discussed that with the lawyers from
5 Shook, Hardy?
6 MR. GAY:
7 Objection. Privilege.
8 THE COURT:
9 Overruled.
10 Answer the question if you're able to.
11 A. No, I've never discussed their position.
12 EXAMINATION BY MR. RUSS HERMAN:
13 Q. Sir, when you were here last, you indicated
14 you had seen some Tobacco Institute surveys. Do you
15 recall saying that, sir?
16 A. Yes. I have seen some over the years.
17 Q. And you know the Tobacco Institute is a
18 defendant in this case with these cigarette
19 companies; isn't that correct? You do know that,
20 don't you?
21 A. Didn't know that, but I have no reason to
22 dispute it.
23 Q. You know that the Tobacco Institute was
24 formed by the companies, the cigarette companies, as
25 a public relations arm and as a lobbying arm; isn't
26 that true?
27 A. Yes, and they also gather data on tobacco as
28 well.
29 Q. All right. I'm going to show you Exhibit
30 3359.01, which has been admitted in evidence on
31 February 13th, 2003, from Mr. K-N-O-P-I-C-K of the
32 Tobacco Institute to Mr. Kloepper. The document's
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1 dated 9/9/1980.
2 MR. RUSS HERMAN:
3 I'd like to put it on the screen, Your
4 Honor. It's been previously admitted.
5 I'd like to publish, Your Honor.
6 THE COURT:
7 Objection. Hearing none, you may
8 publish.
9 MR. RUSS HERMAN:
10 Carl, would you put up the first page,
11 please? Would you put the date up? Carl, go
12 to the second page. Would you put the last
13 paragraph up.
14 May we publish, Your Honor?
15 THE COURT:
16 You may publish.
17 MR. RUSS HERMAN:
18 Would you enlarge it, please?
19 EXAMINATION BY MR. RUSS HERMAN:
20 Q. You see the words, Shook, Hardy there?
21 A. I do.
22 Q. Same law firm that was on the 1985 lawsuit
23 purpose survey, correct?
24 A. That's correct.

25 Q. You'll see where it says:
26 "Shook, Hardy reminds us, I'm told, that
27 the entire matter of addiction is the most
28 potent weapon a prosecuting attorney can have
29 in a lung cancer/cigarette case. We can't
30 defend continued smoking as 'free choice' if
31 the person was 'addicted.'"
32 You see that?

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1 A. I do.
2 Q. Aren't you Shook, Hardy's answer to addiction
3 by trying to shift focus from nicotine addiction to
4 something called economic addiction?
5 A. Well, the answer to addiction is people's own
6 behavior. So, the fact that almost as many smokers
7 have quit smoking as continue to smoke, the fact
8 that smokers are price responsive and respond to
9 smoking restrictions indicate that not all smokers
10 are locked in to smoking. This doesn't mean that
11 smoking isn't hard to quit for many people.
12 Q. Sir, isn't that the party line developed for
13 your testimony?
14 A. No. This is what I've written in my books.
15 Nobody developed it for me. I've written about this
16 for the past 15 years.
17 Q. Yes, sir. Ever since you've been hired by
18 tobacco, you've been writing this material; isn't
19 that true?
20 A. I've been writing about tobacco for the past
21 15 years -- I've been writing -- all my -- none of
22 my work is supported by the industry.
23 Q. I just have one more question, or series of
24 questions, before we break for lunch, as is our
25 custom.

26 Sir, are you familiar with a quotation
27 to the effect: "Don't complain about a dust mote in
28 someone's eye when there's a beam in your own"?
29 A. I don't know the quotation.
30 Q. Do you know the quotation: "Let him without
31 sin cast the first stone"?
32 A. I do.

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18703

1 Q. When you were here last week, one of your
2 Harvard professors criticized your work and you
3 said, Judge Weinstein in some other case wouldn't
4 accept his testimony. Do you recall that?
5 A. I said Judge Weinstein concluded after his
6 testimony that it had no veracity.
7 Q. And you testified to that, which was a
8 personal statement, isn't it true that a judge less
9 than a month ago said that your testimony was not
10 credible in his court?
11 A. I've never heard any such statement. In
12 fact, the judge I testified a month ago told my
13 lawyers that I was the best witness he'd seen in the
14 case.
15 Q. Really?
16 A. Or the smartest witness he'd seen, yes.
17 Q. Really? Well, that's something, because you

18 know you've written that judges and juries don't
19 really understand these scientific matters.
20 MR. GAY:
21 Objection. Objection, Your Honor.
22 MR. WILLIAMS:
23 Objection, Your Honor.
24 THE COURT:
25 Sustained.
26 Don't answer that question.
27 The jurors will disregard.
28 Next question, please.
29 EXAMINATION BY MR. RUSS HERMAN:
30 Q. Just one more question in the series. I need
31 your help. I have to find that legal opinion that
32 the Judge wrote.
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18704

1 MR. MUEHLBERGER:
2 Objection. Judge, may we approach?
3 THE COURT:
4 Yes.
5 EXAMINATION BY MR. RUSS HERMAN:
6 Q. Did you --
7 THE COURT:
8 Just a moment. There's an objection,
9 Mr. Herman.
10 MR. RUSS HERMAN:
11 Oh, okay.
12 (Whereupon, a sidebar conference is held
13 as follows:)
14 THE COURT:
15 Mr. Muehlberger?
16 MR. MUEHLBERGER:
17 Your Honor, my objection is that Mr.
18 Herman continues to quote from documents that
19 are -- characterize documents that are not in
20 evidence, many of which are hearsay, the
21 Gallup article in the Wall Street Journal.
22 He reads the title. It's not in evidence.
23 It's hearsay. The proper way is to put an
24 exhibit before the witness and let us object.
25 He's now characterizing to some legal
26 opinion, I don't know what it is, he has
27 already characterized it, it's not in
28 evidence.
29 THE COURT:
30 You have the opinion?
31 MR. RUSS HERMAN:
32 I sure do, and he says this judge says
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1 he was the best --
2 THE COURT:
3 Is it published?
4 MR. RUSS HERMAN:
5 Yeah. Sure, it is. He's the one that
6 opened the door, Judge, talking about Judge
7 Weinstein and attacking the witness and then
8 just telling us that he's a great witness.
9 It's impeachment.
10 MR. MUEHLBERGER:

11 This is not on your cross list either.
12 MR. RUSS HERMAN:
13 Well, how did I know that he was going
14 to say --
15 MR. MUEHLBERGER:
16 Keep your voice down. You're obviously
17 speaking so the jury can hear you.
18 MR. RUSS HERMAN:
19 I wasn't speaking to the jury.
20 MR. MUEHLBERGER:
21 We object. It wasn't on the cross list
22 and it should have been.
23 MR. RUSS HERMAN:
24 It's impeachment.
25 THE COURT:
26 Is this on your cross list?
27 MR. RUSS HERMAN:
28 Just got that, Your Honor. But it's a
29 published opinion. I mean, he's talked about
30 it. He just said this judge told him he was
31 the best witness he ever heard.
32 MR. MUEHLBERGER:

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18706

1 Object on hearsay basis as well, Judge.
2 I haven't seen it, since it's not on the
3 cross list, to my knowledge.
4 MR. RUSS HERMAN:
5 This man volunteers something that's not
6 on your list from a Weinstein opinion that
7 nobody can find. He says that this judge
8 told him he was the best witness that he had
9 ever heard.
10 THE COURT:
11 I sustain the objection to questions
12 about this judge's opinion of this witness --
13 MR. RUSS HERMAN:
14 Excuse me?
15 THE COURT:
16 I sustain the objection.
17 Next question, please.
18 (End of sidebar.)
19 THE COURT:
20 The objection is sustained.
21 Next question, please.
22 Mr. Herman, it's about lunchtime. Are
23 you about --
24 MR. RUSS HERMAN:
25 Your Honor, that's a good idea.
26 THE COURT:
27 We will recess until 1:30 by the wall
28 clock.
29 (Jury excused.)
30 THE COURT:
31 Let the record reflect the jury left the
32 courtroom.

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18707

1 Anything for the record by plaintiff's
2 counsel?
3 MR. RUSS HERMAN:

4 No, Your Honor.
5 THE COURT:
6 Anything for the record by defendants'
7 counsel?
8 MR. SCHNEIDER:
9 No, Your Honor.
10 THE COURT:
11 I have an announcement to make. Judge
12 Belsome is going to conduct a law day
13 ceremony in this courtroom on May 1st in the
14 morning. So, on that day, we will not begin
15 this trial until 1:00 p.m., on May 1st. May
16 1st, 1:00 p.m. is the start time. That is a
17 Thursday, and it's Thursday of next week.
18 May 1, Thursday of next week, the trial will
19 start at 1:00 p.m., rather than 9:30. We'll
20 recess until 1:30.
21 (Whereupon, a brief recess is taken.)
22 (Whereupon, the proceedings were
23 adjourned at 11:58 p.m.)
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18708

1 REPORTER'S CERTIFICATE
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3
4 I, CAROL VALLETTE SLATER, Certified Court
5 Reporter, Registered Professional Reporter, do
6 hereby certify that the foregoing proceedings were
7 reported by me in shorthand and transcribed under my
8 personal direction and supervision, and is a true
9 and correct transcript, to the best of my ability
10 and understanding;
11 That I am not of counsel, not related to
12 counsel or the parties hereto, and not in any way
13 interested in the outcome of this matter.
14
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16
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19 CAROL VALLETTE SLATER (CCR 78020)
20 CERTIFIED COURT REPORTER
21 REGISTERED PROFESSIONAL REPORTER
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